Under the former view an interesting question arises as to the rights of the parties when a broker, before his insolvency, has pledged stock of his own, together with that of his customers, to a *bona fide* pledgee for value. It must be clear that the parties are estopped to deny the right of the pledgee to be protected to the extent of his loan, since he has changed his position in good faith, relying on the apparent title of the broker.[6] It is submitted that the relation of the parties is analogous to that of a suretyship. The subpledgee may on default of his principal look to the securities for satisfaction of his claim, and the owners of the securities in turn have a right of reimbursement against the broker.[7] If the owners of the stock all stand in the same relation to the broker — for example, if they have all deposited stock with him as collateral for advances — the problem becomes a simple one of suretyship. Equity will see that the securities are applied by the subpledgee *pari passu* in payment of his loan.[8] And if the subpledgee in ignorance of the claim of the true owners sells the securities belonging to one, leaving the others' undisposed of, it will be decreed that they be sold and the proceeds so applied that the burden of the loss be borne proportionately by all, in accordance with the right of a surety to seek contribution from his co-sureties.[9]

A more difficult question arises where the parties whose securities have been wrongfully pledged do not stand on the same footing. Such is the case where a broker pledges, wrongfully as before, his own stock together with that of A which he held for sale or as a simple bailee, that of B which he held as collateral for advances, and that of C, purchased on margin. A recent New York case, following an earlier decision,[10] held that after the *bona fide* pledgee had satisfied his claim out of the proceeds of a sale of the securities, A was entitled to priority on what remained for the entire value of his stock. *Matter of Mills*, 39 N. Y. L. J. 761 (N. Y., App. Div., May, 1908). This, it is submitted, is correct on principle. It must be presumed that the broker intended that his own securities should be applied before recourse was had to the stock of the co-sureties;[11] and though the broker has been guilty of a conversion as to A, B, and C, yet A, who did not impliedly authorize re-hypothecation, should have a right in equity to demand that the subpledgee first apply to the satisfaction of his claim stock authorized to be repledged.[12]

RESCISSION OF INSURANCE CONTRACTS WITHOUT RESTITUTION. — It is a general rule that there can be no rescission of a contract unless the parties can be put in *status quo*.[1] The right to rescind is equitable, and since equity will not permit a forfeiture the rescinding party must restore anything he has

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6 McNeil *v.* Tenth Nat'l Bank, 46 N. Y. 325.

7 McNeil *v.* Tenth Nat'l Bank, *supra;* Farwell *v.* Importers Nat'l Bank, 90 N. Y. 483; Smith *v.* Savin, 141 N. Y. 315.

8 Skiff *v.* Stoddard, *supra*, 225, 226.

9 Gould *v.* Central Trust Co., 6 Abb. N. C. (N. Y.) 381. See Colebrook, Collateral Securities, 326; Jones, Pledges, 512.

10 Willard *v.* White, 56 Hun (N. Y.) 581.

11 Myers *v.* Merchants Nat'l Bank, 16 N. Y. Supp. 58; Le Marchant *v.* Moore, 150 N. Y. 209; Smith *v.* Savin, *supra*.

12 Skiff *v.* Stoddard, *supra;* Willard *v.* White, *supra;* Harmon *v.* Sprague, 163 Fed. 486; Tompkins *v.* Morton Trust Co., *supra*.

1 Byard *v.* Holmes, 4 Vroom (N. J.) 119; Gay *v.* Alter, 102 U. S. 79; Handforth *v.* Jackson, 150 Mass. 149.

received under the contract. If it is impossible to make the other party whole there can be no rescission,[2] and that is so, except in one class of cases, whether the right to rescind arose through fraud or otherwise.[3] A long line of insurance cases, however, has decided differently.[4] In a recent case, for instance, the plaintiff was induced to continue a policy of life insurance by the fraudulent representation of the insurer's agent that if he paid the premiums for four more years, he would then hold a fully paid-up policy. At the end of the four years the plaintiff discovered the fraud, elected to rescind, and sued for the amount of the premiums paid. The court allowed full recovery. *Kettlewell* v. *Refuge Assurance Co.*, 24 T. L. R. 216 (Eng., Ct. App., June 10, 1908).

If a policy of insurance is void at the outset without fault of the insured, there is no difficulty in his recovering in the ordinary action for money had and received on a consideration failed, because, as there could have been no enforcement of the policy, the insurer has been under no risk. But a contract induced by fraud is merely voidable at the option of the defrauded party, and where that is the only ground for rescission there is no failure of consideration, since the insurer has been carrying the risk or furnishing insurance; for it would have been liable for the full amount of the policy if the insured had died before electing to rescind.[5] As the insurer has given consideration it must therefore be indemnified for the risk incurred, or else there should be no rescission. This seems to be the rule in the analogous case of a policy issued to an infant. Infancy, like fraud, makes the contract voidable at the infant's election. It is accordingly held that the infant cannot rescind without compensating the insurer for his risk, on the ground that the carrying of insurance, even subject to the insured's option, is a consideration for which the insurer is entitled to compensation.[6] Theoretically, the nature of insurance is such that it is impossible to determine the value of the particular risk the insurer has assumed. Practically, the growth of the insurance business has resulted in such close calculations of the value of every sort of insurance that it is almost on the same basis for buying and selling as ordinary choses in action. It is therefore possible for the insured to restore the consideration he has received under the contract and when this is done rescission is allowable.[7] It is unfortunate that in the case of fraud it seems to be definitely settled in most jurisdictions that the insured as in the principal case can recover the full amount of the premiums, with no deduction.[8] These cases, failing to distinguish between void and voidable contracts, establish an anomalous exception to the general rule requiring restitution. They overlook the fact that rescission itself can be justified only when the parties are reinstated substantially in their original situation. The result is, the insured has had the benefit of insurance without paying for it while the insurer is penalized despite the equitable rule against forfeitures.

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[2] Bailey *v.* Fox, 78 Cal. 389; Todd *v.* McLaughlin, 125 Mich. 268.

[3] Bailey *v.* Fox, *supra;* Buchenau *v.* Horney, 12 Ill. 336.

[4] McCarty *v.* N. Y. Life Ins. Co., 74 Minn. 530. But see Collins *v.* Townsend, 58 Cal. 608.

[5] Continental Life Ins. Co. *v.* Houser, 111 Ind. 266.

[6] Johnson *v.* Northwestern Mut. Life Ins. Co., 56 Minn. 365. See also City Sav. Bank *v.* Whittle, 63 N. H. 587; Rice *v.* Butler, 160 N. Y. 578.

[7] Day *v.* Conn. Gen. Life Ins. Co., 45 Conn. 480.

[8] Hedden *v.* Griffin, 136 Mass. 229; Van Werden *v.* Equitable Life Ass'ce Soc., 99 Ia. 621; Caldwell *v.* Ins. Co., 140 N. C. 100. See also Butler *v.* Prentiss, 158 N. Y. 49, 64, which seems to extend the doctrine.